SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 692

PAUL V. BYRNE, JR.,

Petitioner,

vs.

CHICAGO TITLE AND TRUST COMPANY, INDIVIDUALLY AND AS TRUSTEE OF TRUST AGREEMENTS No. 42212 AND No. 44999; THE CATHOLIC BISHOP OF CHICAGO, A CORPORATION SOLE; THE FIRST NATIONAL BANK OF CHICAGO, INDIVIDUALLY AND AS TRUSTEE OF TRUST AGREEMENT No. 51296-6; ROGERS, PAUL AND HANSEN; QUINN, JACOBS, BARRY, AND LATCHFORD; QUINN, JACOBS AND BARRY; JOHN B. HENDRICKS; FRANCIS E. SCHLAX; ROBERT V. HOGAN; FRANK A. KARABA; DON W. FEELEY; KIRK L. MacKINNON; GEORGE A. HANSEN; VLADIMIR G. URSE; LORETTO TENNES, INDIVIDUALLY AND AS TRUSTEE OF THE THOMAS BYRNE ESTATE LIQUIDATION TRUST; ALBERT BUCKLEY; DONALD MASTERSON; NORA CAMPION; THADDEUS ADESKO; AND ROBERT L. HUNTER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THOMAS B. GILMORE,
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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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ARGUMENT.

This Respondent, Kirk L. MacKinnon, is an attorney licensed by the State of Illinois. With respect to this Respondent, Petitioner states only the following in his "Statement of the Case":

"... During a short interlude on the seventh day of Petitioner's incarceration (January 16, 1963) the respondents Schlax, MacKinnon and Adesko conducted a proceedings (R. 24-41, A. 19-26) denominated 'judicial' and 'civil' in a small chamber provided by respondent URSE far removed from any court house to which petitioner was brought semi-comatose.

The brief inquisitorial proceedings, unburdened by any fact finding process, show the purported appearance of respondent MacKinnon (whom petitioner has yet to meet), as 'attorney for defendant' (R. 42, A. 26) as well as a novel notion of advocacy (R. 24-41, A. 19-26).

Pursuant to the orders entered by respondents, petitioner was punished by commitment to close confinement and the threat of forced psycho-surgery for the welfare of the public, until April 15, 1963 (R. 13, R. 11, A. 9)."

To clarify the Petitioner's "Statement of the Case", this Respondent calls the attention of this Court to the fact that the original Complaint which was dismissed by the District Court had attached to it as Exhibit D (R. 24-41) a transcript of the above-described commitment proceedings. Respondent MacKinnon's appearance (R. 42, A. 26) was likewise attached to the Complaint as part of Exhibit D and his representation in these proceedings is initially reflected in the said transcript on page 3 thereof:

"Mr. McKinnon: My name is Kirk McKinnon, 38 South Dearborn. I represent Mrs. Byrne, the mother.

The Court: And the patient himself, Paul Byrne, is that right?

Mr. Byrne: Yes."

These very same commitment proceedings were the subject matter of a prior action brought by this Petitioner which, as in the case of the instant suit, was predicated upon alleged violations of the Federal Civil Rights Act, 42 U. S. C. A. §§ 1983, 1985. The prior Complaint was dis-

missed for failure to state a claim upon which relief can be granted, and the refusal of the District Court to grant leave to file an amended complaint was affirmed by the Circuit Court of Appeals. *Byrne* v. *Kysar, et al.*, 7 Cir., 347 F. 2d 734 (1965); *certiorari* denied 383 U. S. 913; rehearing denied 384 U. S. 914; motions for leave to file second petitions for rehearing denied 384 U. S. 994.

In Petitioner's prior action under 42 U. S. C. A. §§ 1983, 1985, he joined as a party defendant another attorney who appeared in the same State Court commitment proceedings as Counsel for Petitioner's wife. Although Respondent MacKinnon, notwithstanding his appearance as an attorney in these same commitment proceedings, was not also made a party defendant in *Byrne* v. *Kysar et al., supra,* the ruling of the Circuit Court of Appeals on the question of the amenability of a private attorney to suit under 42 U. S. C. A. §§ 1983, 1985 is relevant here:

> ". . . Defendant Schlax's participation in the proceeding as a private lawyer did not make him a state functionary acting under color of law within the meaning of the Federal Civil Rights Act. Skolnick v. Martin, 7 Cir., 317 F. 2d 855, 857." *Byrne* v. *Kysar, et al.*, 347 F. 2d 734, at 736 (1965), *cert.* denied 383 U. S. 913.

Conclusion.

It is submitted that the Petitioner has not set forth any facts upon which to base a liability of this Respondent under the Federal Civil Rights Act, 42 U. S. C. A. §§ 1983, 1985. The Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS B. GILMORE,
RAYMOND OLSON, JR.,
Attorneys for Respondent.